LEGAL | By Sonia M. Younglove, Esq.

Section 8 Is Landlord's Choice

Q: After a trustee's sale foreclosure by a senior lienholder, can the junior lienholder sue me for the money owed?

A: It depends on the type of loan you have with the junior lienholder. If a senior lienholder has foreclosed, resulting in the property being conveyed free and clear of the junior lien, then the junior security interest has no value. In that situation, the junior lienholder is "sold out" and may be able to sue the borrower directly on the promissory note (*Roseleaf Corp.* v. *Chierighino* [1963]). The sold out junior lienholder will be unable to sue on the promissory note if the junior lienholder was the seller of the property for any kind of real property. In addition, if the junior lien secures a purchase money loan on residential one-to-four-unit property that the purchaser intended to occupy at the time of the loan, then the junior lienholder will be unable to sue on the note (*Brown* v. *Jensen* [1953]). Note: Pending legislation may change this law. Keep current with the law, by going to http://car.org/legal/.

In *Sabi* v. *Sterling* (2010), a tenant who became eligible for Section 8 assistance payments sued the landlord for refusing to participate in the Section 8 program. The tenant claimed that the landlord violated the Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act because the tenant was disabled. The 2nd District Court of Appeal held that a landlord doesn't violate FEHA's prohibition against discrimination based on source of income because the landlord doesn't wish to participate in the program. Furthermore, the landlord was not deemed to have failed to accommodate the tenant's request as a disabled person because the landlord refused to participate in the Section 8 program. Thus, the landlord did not violate the Unruh Civil Rights Act either.

Oral Promise Fails to Halt Foreclosure

>> In *Garcia* v. *World Savings* (2010), the borrowers, the Garcias, brought an action against their mortgage lender for wrongful foreclosure, breach of contract, promissory estoppel, and unfair business practices. The trial court granted World Savings' summary judgment motion. The 2nd District California Court of Appeal reversed with respect to the claim for promissory estoppel, but otherwise affirmed the trial court's ruling.

The Garcias bought the property and began construction on their home in 2004. Between October 2006 and August 2007, they failed to make payments on their loan with World Savings. In January 2007, the lender filed a notice of default. In May 2007, the lender recorded a notice of trustee's sale to take place June 2007, which was continued to July 2007. The sale date was again postponed to August 2007 and the Garcias attempted to refinance other property they owned to cure the default. The Garcias' mortgage loan broker communicated with a manager in the bank's foreclosure department, informing him that the Garcias had obtained a written conditional loan approval and asked him to again postpone the sale date to September 2007. The manager faxed a reinstatement quote to the mortgage loan broker that would cure the default. However, World Savings did not postpone the sale date despite an assurance from the bank manager that the property "won't go to sale because I have the final say-so and as long as I know that you could close it the first week of [September], I'll extend it. ... If I know that you need a few more days." The trustee sold the property at the foreclosure sale on August 30, 2007. Unaware, the Garcias went forward with the refinancing of their other property and sent the bank the check to cure the default. World Savings returned the check uncashed.

In analyzing the breach of contract claim, the appellate court held that there was no consideration to support the promise to postpone the foreclosure sale. The Garcias' efforts to obtain a loan did not constitute sufficient consideration, because it added nothing new to the original agreement between the parties. "As a general rule, a gratuitous oral promise to postpone a foreclosure sale or to allow a borrower to delay monthly mortgage payments is unenforceable."

For an action on promissory estoppel, it was necessary to show (1) that the lender made a promise to postpone the sale, (2) that the Garcias relied on that promise to their detriment, and (3) that it would be unjust to allow the lender to avoid its promise. The Garcias' actions in procuring a high-cost, high-interest loan by using other property

Continued on page 30

Legal

Continued from page 10

they owned as security were sufficient to show "detrimental reliance" according to the appellate court.

The Garcias were unable to show "wrongful foreclosure." As a general rule, if the funds necessary to reinstate or pay off a defaulted loan secured by a deed of trust are received by the lender prior to the foreclosure sale, the foreclosure sale is invalid and may be set aside even if the purchaser was an innocent third party. However, if the funds are received by the lender after the trustee's sale date and the property is sold to a third party, the foreclosure cannot be set aside. In this case, the Garcias specifically indicated that they did not want to set aside the foreclosure sale. Since there was no wrongful foreclosure, the claim for unfair business practices could not proceed. ◆

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Play It Safe

Continued from page 21

Location-based social networking: Technologies that broadcast your location do have business and marketing applications. Safety experts like Moore and Jewell Crosby, a retired police officer turned REALTOR® with Dilbeck REALTORS® GMAC Real Estate, Arcadia, cringe when you mention the idea of signaling your exact location, particularly when you're at an empty, foreclosed property or at a piece of remote land that you're marketing. Their message: Proceed with extreme caution. For more, see www.time.com/time/business/article/0,8599,1964873,00.html.

New Economy

It's not just technology that offers fresh dangers. So does the changed economy. Financially desperate, disgruntled homeowners, who feel they've gotten the short end of the stick on a short sale or foreclosure, abound.

Among the behaviors that practitioners have seen at foreclosed properties are a sniper who shot out the windows and someone who used a sledgehammer to open a lockbox.

Such empty properties are havens for squatters, partiers, and drug addicts.

Moore even recalls an instance where a house was booby-trapped. Someone had removed the pins from interior doors and rigged them to fall when they were opened.

And Anderson once entered an empty property, heard noise, and thought, "Those rats must be huge." It turns out that homeless people were sleeping there.

Such are some of the reasons Crosby suggests taking particular caution when entering or showing foreclosed properties.

If anything is amiss, call the police, says Crosby.

And warns Moore, "Always err on the side of safety." ◆

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